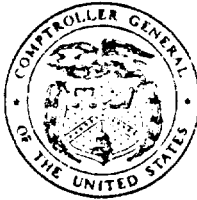


# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

Eaton  
24539

FILE: B-208189.2

DATE: March 17, 1983

MATTER OF: Twehous Excavating Company, Inc.

## DIGEST:

1. In deciding whether to recommend termination of a contract for the convenience of the Government, GAO considers the good faith of the parties, the extent to which the contract has been performed, the urgency with which it must be completed, and the potential impact of termination upon the contracting agency's mission.
2. When contracting agency has not demonstrated that work will be interrupted or that substantial costs will be incurred by termination of contract awarded following improper cancellation of solicitation, GAO will recommend reinstatement and award to low, responsive, responsible bidder under that solicitation.

This decision concerns recommendations for corrective action that our Office left open in sustaining the protest of Twehous Excavating Company, Inc., B-208189, January 17, 1983, 83-1 CPD 43. We conclude that the Department of Agriculture's Soil Conservation Service (SCS) should terminate the protested contract for the convenience of the Government.

In our initial decision, we sustained Twehous' protest on grounds that the contracting agency had improperly canceled a solicitation for reconstruction of an abandoned mine site in Randolph County, Missouri. SCS believed that the method by which it intended to evaluate unit prices for various types of construction equipment had not been clearly set forth in invitation for bids No. SCS-4-MO-82, and that the solicitation therefore had misled bidders. We found, however, that an award under the canceled solicitation would have served the Government's needs and would not have prejudiced any bidder.

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During development of the protest, SCS awarded a \$356,800 contract to Magruder Construction Company, the responsive low bidder under a revised solicitation. In sustaining the protest, we left open the question of whether this contract should be terminated for the convenience of the Government. We requested the Secretary of Agriculture to issue a stop work order and to determine whether Twehous, the second-low bidder under the canceled solicitation, would be willing and able to complete the project at its original bid price if we recommended termination and reinstatement.<sup>1</sup>

If Twehous were interested, we asked that SCS determine precisely what it would cost to terminate Magruder's contract and then submit its recommendations to us.

Currently, Twehous "stands ready" to perform in accord with its original bid. SCS, after issuing the requested stop order on January 21, on February 22, 1983, instructed Magruder to resume work. The agency recommends strongly against termination.

In determining whether to recommend termination of a contract for the convenience of the Government, our Office considers a number of factors in addition to cost. These include the good faith of the parties, the extent to which the contract has been performed, the urgency with which it must be completed, and the potential impact of termination upon the contracting agency's mission. Logistic Systems Incorporated, 59 Comp. Gen. 548, 558 (1980), 80-1 CPD 442, aff'd on reconsideration, October 24, 1980, 80-2 CPD 313. Thus, for example, it may be appropriate to recommend termination if a contractor has not yet begun to perform or a stop work order has not yet been issued. The impact upon an agency's mission in such cases is presumed to be

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<sup>1</sup>It was clear from the outset that readvertising would cause unacceptable delays and create an auction situation similar to the one that already had occurred in connection with SCS's revised solicitation. We therefore did not consider this a viable recommendation. See generally Apex International Management Services, Inc., 60 Comp. Gen. 172 (1981), 81-1 CPD 24 (recommending reinstatement and award under an improperly canceled solicitation in order to avoid an auction).

negligible. See Northeast Construction Company, 61 Comp. Gen. 317 (1982), aff'd sub nom Mitchell Construction Company, Inc.; Bill Strong Enterprises, Inc.--Request for Reconsideration, B-205246.2, B-205246.3, August 18, 1982, 82-2 CPD 148. We also consider the seriousness of the procurement deficiency and the degree of prejudice to other bidders or to the integrity of the competitive system that would result from letting an improper award stand. Id.

In this case, SCS primarily advances environmental conditions in its arguments against termination. The agency describes the terrain at the abandoned strip mine as extremely rough, covered with a variety of tree heights and growths on very steep slopes and narrow ridges. Due to the acid nature of the material, there are "hot spots" that the agency states could cause sediment damage to property beyond the mine site. In a dispatch dated February 16, 1983, an SCS official in the field stated that conditions were rapidly becoming more acid due to surface exposure. In addition, freezing and thawing conditions were loosening the soil surface in the entire area, creating excessive movement of silt into sediment basins. While February in Missouri was unusually mild, March winds are expected to create additional problems, polluting the air with exposed acid particles. SCS's order to Magruder to resume work appears to have been an attempt to mitigate these damages.

As of mid-February, according to SCS, Magruder had completed all initial rough grading and was in a position to utilize fully equipment that previously it had not been able to operate efficiently. The north half of the project was estimated to be within 2 weeks of completion, and the south half was approximately 20 percent complete. Further, Magruder was reported to be within 3 weeks of the primary seeding date for the north half of the project and, upon resuming work, also was expected to be able to seed the south half according to schedule. If the contract is terminated and this is not accomplished, SCS states, it will be necessary to lime, temporarily seed, and mulch approximately 60 acres in order to prevent erosion during spring rains.

As for termination costs, Magruder's unreimbursed costs, including profit and overhead, are approximately \$66,000. (Magruder already has been paid \$118, 626.) SCS considers \$66,000 reasonable, since it is slightly below its own estimate. Additional costs associated with

termination include \$37,000 that SCS would be required to pay Twehous in light of its original bid prices, which were higher than Magruder's prices on the resolicitation. SCS further states that it would be necessary to remove some materials from the site and store them during the change of contractors, at an estimated cost of \$16,000. Costs of temporary seeding also must be considered, the agency states, bringing the cost to the Government for termination and award to Twehous to above \$120,000.

We are not persuaded. On the record before us, termination of Magruder's contract appears neither impracticable nor contrary to the best interest of the Government.

First, SCS has not demonstrated that a change of contractors would require further interruption of work at the mine site, exacerbating the environmental problems already encountered. If Twehous "stands ready," as it has advised our Office, it would appear that Magruder could leave the site at the close of one work day and Twehous could pick up the following. We have no indication that Twehous would require time or incur costs for mobilization. We therefore fail to see why seeding, mulching, and similar protective measures would be needed, or why materials would have to be removed from the site and stored.

Second, the termination costs listed by SCS appear to include \$66,000 that will not be duplicated if Twehous completes performance. Magruder, it is true, is entitled to be paid for labor, materials, and other direct costs already incurred, as well as for profit. See Federal Procurement Regulations §§ 1-18.802-3 (amend. 48, September 1968), 1-8.307-2 (amend. 75, April 1970). However, SCS ultimately must pay for all labor and materials associated with the project, regardless of who the contractor is. The only additional cost to the Government as a result of termination would be \$37,000, which would be incurred because of Twehous' higher bid prices under the original solicitation.

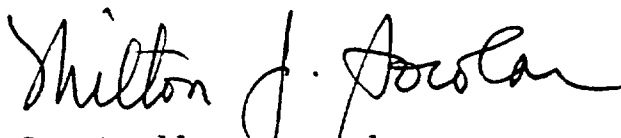
SCS further indicates that it would expect to take title to materials purchased by Magruder and delivered to the mine site, furnishing them to Twehous for use in completion of the project. The agency states that these

materials are represented by 10 line items in Twehous' bid and that it expects to negotiate prices for these items. Since this was a formally advertised procurement, we see no legal basis for such negotiation. Rather, the line items should simply be deleted from any contract awarded to Twehous.

In addition, Magruder has either leased or purchased seven items of heavy construction equipment that, under terms of its contract, are operated under SCS supervision at a set hourly rate. While the cost of this equipment may have some impact upon a termination settlement, because SCS has not even discussed it in responding to our Office, we assume the total amount involved would be insignificant.

We conclude that Magruder's contract should be terminated for the convenience of the Government; that the improperly canceled solicitation should be reinstated; and that award should be made under it to Twehous, the low, responsive, responsible bidder.

By letter of today, we are so advising the Secretary of Agriculture.

for   
Comptroller General  
of the United States